they continue to refuse to change their corporate name by deleting 'Boyden' from it and thereby prevent, until the trial of the action, the defendants from registering their own company with the name 'Boyden' and commencing their own business in Singapore. Furthermore, the plaintiffs also would have realized that by virtue of cl 12 of the licence agreement, the defendants can still, in any event, cause the automatic termination of the licence agreement by giving notice of their intention not to renew it within 18 months prior to the expiry of the initial term. So the business relationship cannot be saved without the consent of the defendants. The second plaintiff is not entirely unprotected. If the termination were wrongful, it is entitled to damages and it is clear that in the circumstances of this case damages would be an adequate remedy. Therefore both commercial sense and commercial reality demand an end to the dog in the manger attitude of the plaintiffs.

In the premises, whether Megarry J's test or Hoffmann J's formulation is applied, the defendants are entitled to succeed.

Accordingly, I make an order in terms of prayer 1(a) and (b) of the motion. There will also be an order on prayer 2 limited to delivery of a duplicate set of the files kept in connection with the business within 30 days hereof and, if the duplication is done by the plaintiffs, upon payment by the defendants of a reasonable sum for copying charges. The costs of this motion will be costs in the cause.

Application allowed.

Solicitors: *Arthur Loke & Partners*; *AC Fergusson.*

Reported by *PS Ranjan*

MALAYSIAN REPORTS

Public Prosecutor v Lee Chan Sang

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CRIMINAL APPEAL NO 9 OF 1988
HASHIM YEOP A SANI AG CJ (MALAYA), MOHAMED YUSOFF SCJ AND AJAIB SINGH J
30 NOVEMBER AND 20 DECEMBER 1988

Criminal Procedure – Charge of trafficking in dangerous drugs – Triable only in the High Court – Accused produced in Magistrate's Court – Charge against some of the accused including respondent withdrawn by prosecuting officer – Respondent and other accused acquitted and discharged – Respondent subsequently rearrested and charged for offence under Dangerous Drugs Act – Written consent of Public Prosecutor – Plea of autrefois acquit – Plea upheld in High Court – Magistrate's Court has no jurisdiction even to record plea – No trial in Magistrate's Court – Plea of autrefois acquit cannot succeed – Criminal Procedure Code (FMS Cap 6), ss 254 & 302 – Dangerous Drugs Act 1952, ss 39B & 41A – Federal Constitution, arts 7(2) & 145(3)

Constitutional Law – Plea of autrefois acquit – When available – Federal Constitution, art 7(2)

Words and Phrases – 'autrefois acquit'

In this case, the respondent and some other accused were charged in the Magistrate's Court with trafficking in dangerous drugs. The respondent and the other accused were produced in the Magistrate's Court. The prosecuting officer withdrew the charge against the respondent and some of the other accused, leaving only one accused, Lim Kim Thiar, against whom an amended charge was preferred. The prosecuting officer also tendered the written consent of the Public Prosecutor for the prosecution of Lim Kim Thiar. The magistrate committed Lim Kim Thiar for trial in the High Court and acquitted and discharged the respondent and the other accused. Subsequently, the respondent was rearrested and charged for an offence under the Dangerous Drugs Act 1952. The consent of the Public Prosecutor was issued for the prosecution. When the respondent was produced before the High Court, a plea of autrefois acquit was entered and this was upheld by the learned judge. The Public Prosecutor appealed.

Held, allowing the appeal:

(1) Section 41A of the Dangerous Drugs Act 1952 confers jurisdiction on the Magistrate's Court only in so far as to receive the production of the accused person and to have the charge explained to him and then to transmit the case to the High Court forthwith without holding a preliminary inquiry. The Magistrate's Court has no jurisdiction even to record a plea of the charge.

(2) Section 39B of the Dangerous Drugs Act 1952 provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. Where a person is produced before a court but before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead. It is also provided that the case shall not be further prosecuted until the consent has been obtained. In this case, the consent of the Public Prosecutor in respect of the respondent was only issued after he was rearrested and charged in court on the subsequent charge.

(3) On a proper reading of s 39B and s 41A of the Dangerous Drugs Act 1952, it is clear that s 254 of the Criminal

Procedure Code (FMS Cap 6) cannot apply to the facts of this case because no trial had commenced before the magistrate when the case against the respondent was withdrawn and the magistrate purported to acquit and discharge him.

(4) The plea of autrefois acquit can only succeed where the accused is in jeopardy in the first proceeding, that is, where the merits of the prosecutor's case have been gone into, so that the decision of the court was that the evidence was insufficient to support the prosecution.

Legislation referred to
Criminal Procedure Code (FMS Cap 6) ss 254, 302
Dangerous Drugs Act 1952 ss 39B, 41A
Federal Constitution arts 7(2), 145(3)

Appeal from: Federal Territory Criminal Trial No 24 of 1984 (High Court, Kuala Lumpur)

Gooi Soon Seng, Deputy Public Prosecutor, for the appellant.
Manjeet Singh Dhillion (*Atma Singh* with him) for the respondent.

Cur Adv Vult

Hashim Yeop A Sani Ag CJ (Malaya) (delivering the judgment of the court): The background of the appeal may be summarized as follows. The respondent was first arrested on 27 November 1983. Subsequently, along with four others, the respondent was charged in the Kuala Lumpur Magistrate's Court on 9 December 1983 and the case was registered as ACDO 1107 of 1983. The charge against them was that they jointly on 27 November 1983 at Jalan Ampang, Kuala Lumpur in furtherance of the common intention of them all did traffic in dangerous drugs, to wit, 3,600 gm of heroin, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), an offence punishable under s 39B(2) of the Act read with s 34 of the Penal Code.

On 9 March 1984 all the accused were produced in the same Magistrate's Court. The prosecuting officer withdrew the charge against all except one Lim Kim Thiar against whom an amended charge was preferred also under s 39B of the Act. On that day the prosecuting officer also tendered a written consent of the Public Prosecutor under s 39B(3) of the Act. The magistrate committed the said Lim Kim Thiar for trial in the High Court and acquitted and discharged the rest including the respondent.

In July 1984 the respondent was arrested again and on 16 July 1984 the Public Prosecutor issued a written consent under s 39B(3) of the Act for his prosecution for an offence of doing an act for the purpose of trafficking in dangerous drugs, to wit, 871.63 gm of heroin, by Lim Kim Thiar by negotiating a deal for the disposal of the said drugs by the said Lim Kim Thiar.

On 11 February 1988 the respondent was produced before Shankar J in the High Court, Kuala Lumpur to face the said charge. Before his plea was taken his counsel, Mr Manjeet Singh, made a preliminary submission that autrefois acquit applied to his client and that it was not open to the prosecution to proceed with the matter. As stated in his grounds of judgment the learned judge agreed with this submission and upheld the plea of autrefois acquit.

The Public Prosecutor's appeal evolved around the question whether the order of acquittal by the magistrate was valid. The Public Prosecutor was also dissatisfied with the learned judge's application of s 254 of the Criminal Procedure Code to the respondent, and secondly, against the learned judge's ruling that the plea of autrefois acquit was available to the respondent.

In our view the answer to his appeal lies simply in the proper interpretation of s 39B and s 41A of the Act. Section 41A reads:

> 41A (1) Where any case in respect of an offence under this Act is *triable exclusively by the High Court* or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which *shall*, after the charge has been explained to him, *transmit* the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such court as soon as may be practicable.
>
> (2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
>
> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.
>
> (4) The provisions of subsections (1), (2) and (3) shall have effect *notwithstanding any other written law to the contrary*.
>
> (emphasis provided)

In simple language what that section directs is that notwithstanding any other written law to the contrary, an accused person who is charged with an offence which is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court shall be produced before the Magistrate's Court where after the charge has been explained to the accused the Magistrate's Court is required to transmit the case to the High Court without holding a preliminary inquiry.

Section 41A of the Act therefore confers jurisdiction on the Magistrate's Court only in so far as to receive the production of the accused person and to have the charge explained to him and then to transmit the case to the High Court forthwith without holding a preliminary inquiry.

The Magistrate's Court has no jurisdiction even to record a plea of the charge. Indeed s 41(3) of the Act

directs that the trial of the case shall be by a judge of the High Court sitting alone.

Section 39B(3) of the Act provides that a prosecution under that section shall not be instituted except by or with the consent of the Public Prosecutor. That subsection also directs that the case *shall not be further prosecuted until the consent has been obtained.* In respect of the respondent the Public Prosecutor's consent was issued only on 16 July 1984.

Section 39B(4) provides that when a person is brought before a court but before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead.

Section 254 of the Criminal Procedure Code deals with the power of the Public Prosecutor to decline to prosecute further at any stage of the trial. After Merdeka this provision finds its basis in art 145(3) of the Federal Constitution which provides that it is in the Attorney General's discretion to discontinue any criminal proceeding in the civil courts. It is clear from the language of s 254 of the Criminal Procedure Code both in cl (1) and (2) thereof that the power of the Public Prosecutor is exercisable *at any stage of any trial.*

Therefore on a proper reading of s 39B and s 41A of the Dangerous Drugs Act 1952, it is clear that s 254 of the Criminal Procedure Code cannot apply to the facts of this case because no trial had commenced before the magistrate on 9 March 1984.

On the question of the application of the plea of autrefois acquit this doctrine is in fact enshrined in art 7(2) of the Federal Constitution which declares that a person who has been acquitted or convicted shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

But autrefois acquit means 'formerly acquitted'. It is a bar to criminal prosecution when the prisoner has already been tried for the same offence before a court of competent jurisdiction and has been acquitted. We need not cite authorities for this. The plea of autrefois acquit can only succeed where the accused was in jeopardy in the first proceeding, that is to say, where the merits of the prosecutor's case have been gone into so that the decision of the court was that the evidence was insufficient to support the prosecution.

We accordingly allowed the appeal by the Public Prosecutor and quashed the order of the learned judge.

Appeal allowed.

Solicitors: *Atma Singh Veriah & Co.*

Reported by *Prof Ahmad Ibrahim*

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CIVIL APPEAL NO 102 OF 1987
HASHIM YEOP A SANI AG CJ (MALAYA), MOHAMED YUSOFF SCJ AND AJAIB SINGH J
29 NOVEMBER AND 12 DECEMBER 1988

Civil Procedure – Action for negligence arising from road accident – Third-party notice against Superintendent of District Hospital, Taiping and Government of Malaysia – Whether action against third parties time-barred – Public Authorities Protection Act 1948, s 2(a) – Rules of the High Court 1980, O 16 – Civil Law Act 1956, s 10(1)

In this case, there was a road accident on 14 July 1981 involving a motorcar driven by the appellant and a motorcycle. The motorcyclist and his pillion rider sustained injuries. On 16 July 1981, the motorcyclist died at the Taiping General Hospital of septicaemia and gas-gangrene secondary to multiple fractures. On 19 July 1983, the administrator of the estate of the deceased motorcyclist, together with the pillion rider, brought an action claiming damages against the appellant. The appellant on 4 January 1985 took out third-party notices against the Superintendent, District Hospital, Taiping and the Government of Malaysia claiming contribution and indemnity. The third parties denied that the appellant was entitled to contribution or be indemnified by them and also pleaded that the appellant's action against the third parties was statute-barred by reason of s 2(a) of the Public Authorities Protection Act 1948. When the case came up for hearing, the learned trial judge acceded to the request of counsel for the third parties that the defence of limitation raised by them against the appellant be tried as a preliminary point of law. After hearing submissions, the learned judge ruled that the defence of limitation succeeded and dismissed the appellant's claim against the third parties. The appellant appealed.

Held, allowing the appeal:

(1) Section 10(1)(c) of the Civil Law Act 1956 gives a right to a tortfeasor to recover contribution from any other joint tortfeasor who has caused or contributed to the same damage. Order 16 of the Rules of the High Court 1980 deals with third-party proceedings but a proceeding under the order should not be treated in the same way as an action between a plaintiff and defendant.

(2) Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has a right open against a third party to establish that he possesses a right to contribution or indemnity from the third party. Time should begin to run from the date the defendant is liable.

(3) Therefore in the case of the third parties here, s 2 of the Public Authorities Protection Act 1948 should not assist them although the third-party notices were issued on 4 January 1985 when the period of 36 months had elapsed by then from the date of the accident (14 January 1981) or the date of death of the motorcyclist (16 July 1981).

Cases referred to

1 *Merlihan* v *AC Pope Ltd (JW Hibbert Pagnello, Third Party)* [1946] KB 166 (refd)
2 *Hordern Richmond Ltd* v *Duncan* [1947] 1 All ER 427 (refd)